



Office of Faith-Based and Community Initiatives

Mitchell E. Daniels, Jr., Governor • Paula Parker-Sawyers, Executive Director

COMMUNICATION 2006-P-13

TO: AmeriCorps*State Sub-Grantee Organizations
FROM: Paula Parker-Sawyers
CC: Agency Operations Manual (2006)
DATE: December 18, 2006
SUBJECT: **Wage Garnishment** (AmeriCorps*State Member Living Allowance)

PURPOSE

To clarify the State of Indiana's treatment of AmeriCorps*State Member living allowances relative to wage garnishment.

EFFECTIVE DATE

December 16, 2006

SCOPE

This communication applies to all organizations hosting an AmeriCorps*State program in Indiana and to an individual in his or her capacity as an AmeriCorps*State Member.

RECESSION

None.

STATEMENT OF POLICY

A. *Statement of Purpose.*

In July 2005 the OFBCI sent a letter to the Office of the Attorney General (OAG) requesting a written advisory opinion concerning the application of garnishment orders issued by courts and/or other governmental administrative bodies on AmeriCorps*State Member living allowances.

The OAG notified the OFBCI in December 2006 of its decision not to publish a formal opinion. However, the OAG did provide an informal opinion to the OFBCI in a telephone conversation dated December 15, 2006.

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This policy is the result of the OAG's informal opinion on the stated subject of wage garnishment.

B. Definitions.

AmeriCorps*State means a national service program administered by the Corporation for National and Community Service under the authority of the National and Community Service Trust Act of 1993 (as amended).

CNCS refers to the Corporation for National and Community Service, a federal corporation established by the National and Community Service Trust Act of 1993 (as amended).

Federal share is, for purposes of this policy, the funds awarded to a sub-grantee organization by the CNCS to meet obligations under the Member Support Costs section, as defined in the program budget, specifically the expenses related to Member living allowances.

Garnishee is an individual on whom a garnishment is served.

Garnishment refers to a directive from a court or other related authority directed to an employer or other asset holder requiring that monies, wages, or property due a debtor be withheld and given to a creditor to be applied to a specific debt in arrears. Typically, garnishment is used in aid of execution or attachment.

ICCSV means the Indiana Commission on Community Service and Volunteerism, a body politic appointed by the governor and established under Indiana Executive Order 05-16, and any amendments thereto.

Living allowance is an allowance paid incrementally to an AmeriCorps*State Member as a result of his or her participation in the AmeriCorps*State program. The living allowance is not a wage, nor is it paid on an hourly basis.

Member is an individual:

- (1) Who is enrolled in an approved national service position;
- (2) Who is a U.S. citizen, U.S. national or lawful permanent resident alien of the United States
- (3) Who is at least seventeen (17) years of age at the commencement of service unless the member is out of school and enrolled
 - a. in a full-time, year-round youth corps Program of full-time summer Program as defined in the Act (42 U.S.C. 12572 (a)(2)), in which case he or she must be between the ages of sixteen (16) and twenty-five (25), inclusive, or
 - b. in a Program for economically disadvantaged youth as defined in the Act (42 U.S.C. 12572 (a)(9)), in which case he or she must be between the ages of sixteen (16) and twenty-four (24), inclusive, and
 - c. Has a high school diploma or an equivalency certificate (or agrees to obtain a high school diploma or its equivalent before using an education award) and who has not dropped out of elementary or secondary schools in order to enroll as an AmeriCorps member (unless enrolled in an institution of higher education on an ability to benefit basis and is considered eligible for funds under section 484 of the Higher Education Act of 1965, 20 U.S.C. 1091), or who has been determined through and independent

assessment conducted by the sub-grantee organization to be incapable of obtaining a high school diploma or its equivalent.

Non-federal share is, for purposes of this policy, the amount and/or percentage for which the sub-grantee is responsible, specifically the expenses related to Member living allowances (as defined in Section II of the program budget). The non-federal share, or "match", must be in the form of cash and derived from private sources such as foundations, trusts, and donations.

OFBCI refers to the Office of Faith-Based and Community Initiatives, a state agency established under Indiana Executive Order 05-16, and any amendments thereto.

Sovereign immunity means the doctrine precluding a suit or judgment against the government without its consent.

State is the State of Indiana, its administrative and legal bodies and its political sub-divisions.

Sub-grantee refers to the intermediary or host organization selected through a competitive application process to operate an AmeriCorps*State program.

C. *Legal Commentary.*

AmeriCorps members receive a living allowance paid from both federal and private sources. The Office of the General Counsel for the Corporation for National Service has determined that the federal portion of the living allowance (the amount paid from the National Service Trust) is protected from garnishment by sovereign immunity.

Sovereign immunity protects the property interests of the United States from lawsuits to which the federal government has not consented. The United States maintains a continuing property interest in AmeriCorps grant funds until they are paid in accordance with the grant's terms. Since the Corporation possesses a property interest in the federal share of each member's living allowance, this property is consequently protected by sovereign immunity.

Although the Corporation for National Service lacks the power to waive sovereign immunity, Congress itself may renounce this protection. Congress has issued a limited statutory waiver with respect to an individual's legal obligation to provide child support or to make alimony payments. This waiver applies only to moneys "the entitlement of which is based upon remuneration for employment."

Congress drafted the National and Community Service Act to distinguish AmeriCorps "participants" from "employees." The law prohibits members from performing or duplicating the duties of an ordinary employee, from acting in any way that would replace, displace, or substitute for an ordinary employee, and from performing any activity that would jeopardize an employee's promotional opportunities. Consequently, AmeriCorps participation does not qualify as employment.

Moreover the living allowances received by AmeriCorps members are neither wages nor earnings. These benefits are not geared to the number of hours worked or to member productivity. Instead, members receive living allowances simply to cover "the necessary costs of living (including food, housing and transportation) in the area in which the program is located." The AmeriCorps living allowance is not determined according to federal minimum wage standards, but is instead keyed to the average annual subsistence allowance provided to VISTA volunteers.

Since AmeriCorps participation does not qualify as "employment," and because AmeriCorps benefits do not constitute the type of wages generally paid to an employee, the compensation

members receive cannot be considered "remuneration for employment." Consequently, the federal portion of the living allowance awarded members does not fall within the parameters of the Congressional waiver. Sovereign immunity thus protects these funds from garnishment.

Private sources provide a portion of the funds used to pay AmeriCorps members' living allowances. Funds from these sources receive no special federal protection from garnishment. In the absence of this protection, states are free to garnish these funds as they choose. Most states have enacted very broad and fairly uniform garnishment provisions in order to enforce child support orders. States are required to adopt mandatory withholding of child support from the income of a delinquent parent. Regulations promulgated by the Department of Health and Human Services encourage states to extend their systems to include withholding from forms of income other than wages.

A member may attempt to escape garnishment of the privately funded portion of his or her living allowance by contending that his or her service participation does not constitute employment, and that his or her living allowance does not qualify as a wage. Courts are unlikely to deem national service legislative provisions sufficient to block enforcement of child support order in light of the important social purposes served by child support enforcement. These arguments may, however, assist a member in escaping garnishment for obligations other than child support.

Ann Seidman of the Nonprofit Risk Management Center notes (http://www.nonprofitrisk.org/csb/csb_sli.htm#gar)

D. Application of Indiana Law.

1. General Circumstances and Procedures.

In most circumstances, the garnishment issue will be synonymous with child support orders. Courts in Indiana may issue child support orders against a Member without garnishing a Member's living allowance. However, a court may attach a garnishment order to a child support directive. If the latter is the case, then the sub-grantee, as may be required by the court, is responsible for:

- a. withholding the amount from a Member's living allowance; and,
- b. remitting the amount to the appropriate entity(ies) or individual(s).

2. Scope of Indiana Law.

According to the Office of the Attorney General (OAG), Indiana's garnishment laws are "broad and liberal," which means it is difficult for a debtor to escape judgment, particularly in cases involving child support.

3. Immunity from Garnishment.

The OAG agreed with Seidman's legal commentary, which is noted in section C of this policy. The OAG noted that federal property¹ falls under the protection of sovereign immunity, which has been a settled point of American federal and state case law for the past two centuries. Thus, the courts may not garnish the portion (or percentage) of a Member's living allowance payable from the CNCS' share. Moreover, the courts or other

¹ A federal grant is considered U.S. government property.

administrative bodies may not consider the CNCS' share of a Member's living allowance as a wage when determining child support, alimony, or other debt payments.

4. *Non-Immunity from Garnishment.*

Under Indiana law, the portion (or percentage) of a Member's living allowance payable from the sub-grantee share, which is derived from private sources, is not immune from garnishment or wage determination. According to the OAG, it would be difficult for a Member serving in Indiana to argue that the private source funding for the living allowance is immune from such an order because his or her service is not defined as "employment" under federal statute and, therefore, does not qualify as a wage.

5. *Example.*

The following is an example of the amount of living allowance immune or non-immune from garnishment as based on federal and sub-grantee shares.

| Allowance Amount | Federal Share Percentage | Sub-Grantee Percentage | Federal Share | Sub-Grantee Share | Amount Immune from Garnishment | Amount Subject to Garnishment |
|-------------------------|---------------------------------|-------------------------------|----------------------|--------------------------|---------------------------------------|--------------------------------------|
| \$11,100 | 85% | 15% | \$9,435 | \$1,665 | \$9,435 | \$1,665 |
| \$11,100 | 65% | 35% | \$7,215 | \$3,885 | \$7,215 | \$3,885 |
| \$11,100 | 50% | 50% | \$5,500 | \$5,500 | \$5,500 | \$5,500 |
| \$11,100 | 35% | 65% | \$3,885 | \$7,215 | \$3,885 | \$7,215 |
| \$11,100 | 15% | 85% | \$1,665 | \$9,435 | \$1,665 | \$9,435 |

E. Procedures.

If a Member is subject to a garnishment order, then the sub-grantee should send a letter to the Member's attorney explaining the issues outlined in this policy. In the absence of legal counsel, the sub-grantee should send written notification to the court detailing the issues outlined in this policy.

If the court fails to consider the information as presented by the sub-grantee, please contact the OFBCI immediately to request a letter.

REFERENCES AND PRECEDENCE

A. References.

42 U.S.C. 12651d (e)(3)
I.C. 34-25

B. Precedence.

Should there be any inconsistency between the United States and Indiana Codes, United States and Indiana Administrative Codes, and this internal policy the order of precedence that will prevail is (1) United States Code; (2) Indiana Code; (3) United States Code of Federal Regulations; (4) Indiana Administrative Rules; and, (5) this internal policy.

INTERPRETATION

This policy is subject to the interpretation of federal and state courts, departments, agencies, and administrative bodies.

APPROVAL:



Paula Parker-Sawyers, Executive Director

December 18, 2006

Date